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No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* THE HONORABLE JANET NAPOLITANO, GOVERNOR OF THE STATE OF ARIZONA, THE HONORABLE JAN BREWER, SECRETARY OF STATE OF THE STATE OF ARIZONA, THE HONORABLE JAMES WEIERS, SPEAKER OF THE HOUSE OF REPRESENTATIVES, THE HONORABLE KEN BENNETT, PRESIDENT OF THE SENATE, AND 36 OTHER MEMBERS OF THE FORTY-SEVENTH LEGISLATURE OF THE STATE OF ARIZONA IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

This brief of *Amici Curiae* is submitted on behalf of the Honorable Janet Napolitano, Governor of the State of Arizona, the Honorable Jan Brewer, Secretary of State of the State of Arizona, and 38 members of the Arizona Legislature, including the Speaker of the House and President of the Senate. *Amici* recognize the importance of this case and urge this Court to affirm the ruling of the United States Court of Appeals for the Fifth Circuit.[2]

The State of Arizona displays a Ten Commandments Monument on the grounds of its State Capitol Complex that is almost identical to the one before the Court in this case. Arizona's monument was the subject of a threatened lawsuit in July of 2003. *See* Michael Clancy, *ACLU Seeks Religion-Free Bolin Plaza*, Arizona Republic, July 18, 2003, at A1.

Amici write as elected officials and as citizens to highlight their concern with the impact this case will have on Arizona's Ten Commandments monument and on Arizona's continued ability to acknowledge the social and cultural contributions of religious faith.

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. None of the counsel for the parties authored this brief in whole or in part. Counsel for *amici* have applied for a grant from the Alliance Defense Fund ("ADF") for the preparation of this brief. ADF is a non-profit, 501(c)(3) organization that funds legal work in the public interest. Counsel for *amici* certify that they are the exclusive authors of this brief and that ADF in no way controls the content of this brief.

[2] Arizona's Attorney General, the Honorable Terry Goddard, has already joined with the Attorneys General of 17 other states in a different brief of *amici curiae* in support of Texas. *See* Brief of *Amici Curiae* of the States of Indiana, *et al.*, *Van Orden v. Texas* (No. 03-1500).

SUMMARY OF THE ARGUMENT

This case is an historic opportunity for this Court to reaffirm the ability of states to accommodate and acknowledge religion with public displays. The Texas Ten Commandments monument is a classic example of such permissible government acknowledgment of religion.

For its part, Arizona has an unbroken history of acknowledging that religion is important both to its form of government and to its citizens. Arizona's succinct Preamble to its Constitution declares that the people of Arizona are "grateful to Almighty God for [their] liberties." Ariz. Const. Preamble. Arizona's State Seal and State Anthem acknowledge God's blessing and presence. The decorations, art, statues, and memorials at the State Capitol Complex are filled with references to religion. Acknowledging religion's important place in culture and society is a practice Arizona continues to the present. The recently erected memorials to Father Albert Braun and slain Arizonan Balbir Singh Sodhi are examples of this continuing practice.

The Fifth Circuit was right to uphold the constitutionality of the Texas Ten Commandments monument because Texas has a valid secular purpose for the monument and because the monument is not an impermissible state endorsement of religion. The purpose inquiry has, at times, devolved into a scrupulous investigation for any semblance of religious purpose by the government. In order to avoid inconsistent and unfair results, this Court should reaffirm its purpose prong standards from *Lemon v. Kurtzman* and *Lynch v. Donnelly*: courts should generally defer to official statements of secular purpose and the government need only present a single secular purpose to pass constitutional muster.

State endorsement is gauged with the objective standard of the reasonable observer. Endorsement analysis is rendered an absurdity if the observer is deemed to possess selective knowledge or attributed a myopic focus on religious monuments to the exclusion of other monuments of cultural significance. Moreover, no reasonable observer looking at a state capitol grounds filled with monuments would perceive unique state endorsement of a single religious display simply because it is located at the seat of government.

In religious display cases, the age of the display in question is often part of the endorsement analysis. Indeed, the age of the Texas Ten Commandments monument negates the possibility that the reasonable observer would perceive it as an endorsement of a particular religion. But the First Amendment was not meant to be a "grandfather clause" for aged monuments. Newer monuments, like Arizona's monument to Father Albert Braun, erected on the grounds of the Capitol Complex in 2001, do not impermissibly carry the government's endorsement when they are one of many displays commemorating a diverse culture.

Finally, Petitioner's challenge to the Texas monument smacks of a heckler's veto and utterly lacks constitutional injury. This Court should decline to read into the Establishment Clause a right to suppress particular manifestations of our culture based on mere personal disagreement. The First Amendment does not confer a right to selectively censor religious monuments.

ARGUMENT

I. THROUGHOUT ITS HISTORY, ARIZONA HAS CONSISTENTLY RECOGNIZED THE IMPORTANCE OF RELIGIOUS FAITH TO ITS CITIZENS

Like Texas, the people of Arizona, by the decision of their elected officials, display a Ten Commandments monument on the grounds of their State Capitol. Arizona's Ten Commandments monument is one of the many ways the State acknowledges the role of religious faith in the lives of its citizens.

A. Arizona Acknowledges Religious Faith In Its Founding Documents And In Its Symbolism

Religion has always been a central part of Arizona's government. Arizona is an example of the truth of the maxim voiced by Justice Douglas, "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Arizona's founders chose to begin its Constitution with the words, "We, the people of Arizona, grateful to Almighty God for our liberties, do ordain this Constitution." Ariz. Const. Preamble. The delegates to the Arizona Constitutional Convention in 1910 appointed a chaplain, the Reverend Seaborn Crutchfield, to open each meeting of the Convention in prayer. On the second day of the Convention Rev. Crutchfield offered this prayer:

> Oh, Lord! We come before thee, the members of this convention, in the attitude of prayer, and we ask Thy blessings upon each and every member of this convention. . . . We pray thee, Oh Lord, that this body of men, the representatives of the people of Arizona, may frame such a constitution as will meet the approval of every citizen and that it may grant unto Arizona statehood, and place it among the grand galaxy of states in these United States. . . . These blessings we would ask of Thee, in the name of Jesus Christ, Thy Son, Amen.

The Records Of The Arizona Constitutional Convention Of 1910, 9 (John S. Goff ed., 1991) [hereinafter *Records*].

Arizona expressly acknowledges God in its official state symbolism. The Great Seal of the State of Arizona bears the phrase "*Ditat Deus*" or "God enriches." *Records*, *supra* at 651. Arizona's State Anthem also acknowledges God:

> Come stand beside the rivers
> Within our valley broad.
> Stand here with heads uncovered,
> In the presence of our God!
> While all around about us,
> The brave, unconquered band,
> As guardians and landmarks,
> The giant mountains stand.

1919 Ariz. Sess. Laws Ch. 28 § 1. "It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths." *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2322 (2004) (O'Connor, J., concurring).

B. Arizona Acknowledges Religious Faith With Many Monuments And Displays At The State Capitol Complex, Including Its Ten Commandments Monument

Religion is an essential part of Arizona's story. Catholic missionaries to the Native Americans formed a crucial part of what would become Arizona's cultural identity. The Arizona Capitol Complex includes a statue of one of the most famous of these men, Father Eusebio Francisco Kino. *See* Ariz. State Library, Archives and Pub. Records, Museum Div., *Wesley Bolin Memorial Plaza: Memorial Descriptions* 1 (2001) (on file with the Arizona State Library) [hereinafter *Memorial Descriptions*]. The role of the early missionaries, like Father Kino, is also memorialized inside Arizona's Capitol building. In the 1930s the artist, Jay Datus, was commissioned to paint a series of murals to commemorate Arizona's history. One of the murals entitled, "Missionary Era in Arizona," depicting several missionaries ministering to Native Americans, hangs in the Arizona State Library Reference Room. Ariz. State Library, Archives and Pub. Records, *Dressing Up the Capitol*, *at* http://azcapitol.lib.az.us/capitol_dressing.htm (last visited

01/24/05). The artist explained the painting represented "all the brave men who suffered for their ideals and faith." *Id.*

Arizona's State Capitol Complex contains a monument to Armenian Martyrs, memorializing the victims of a religious pogrom in Turkey between 1915 and 1923. The monument quotes the famous cleric of the Armenian Church, Gregory of Narek: "Let lamentation cease, weeping be stifled; to mourning make an end; let darkness turn to light." The back of the monument contains the engraved names of survivors of the violence who immigrated to Arizona. *Memorial Descriptions*, *supra* at 1. Another monument on the grounds of the Arizona Capitol Complex commemorates "the Arizonans of Jewish Faith who gave their lives in the service of their country." *Id.* In 1984, another monument was added honoring the memory of the Reverend Martin Luther King Jr., whose Christian faith led him to tirelessly champion a national struggle for civil rights. *Id.*

Arizona received its Ten Commandments monument as a gift from the Fraternal Order of the Eagles. The monument is nearly identical to the one at issue in this case. An inscription at the bottom of the monument reads: "Presented To The State Of Arizona By Fraternal Order Of The Eagles Of Arizona 1964." *See* App. 1 (photograph of the monument). Like the challenged monument in this case, Arizona's monument is displayed in a location close to the Capitol building and between the Capitol and the State Supreme Court.

C. Arizona Continues To Commemorate The Religious Faith Of Its Citizens To This Day

Arizona continues the practice of erecting public displays of religious significance. Two recently placed monuments are good examples. In 2001, Arizona placed a statue memorializing Father Albert Braun, a Franciscan priest who, after serving as an Army chaplain in both World Wars, ministered in Arizona from 1949 until his death in 1983. *See*

Program for the Father Braun Memorial Dedication 3-5 (March 4, 2001), *at* http://braunsacredheartcenter.org/br5.jpg *and* http://braunsacredheartcenter.org/br6.jpg *and* http://braunsacredheartcenter.org/br7.jpg (last visited 01/24/05). Father Braun's memorial was dedicated in a ceremony filled with religious significance, including an invocation, benediction, blessings of his statue, and a hymn. *Id.* at 11, *at* http://braunsacredheartcenter.org/br13.jpg (last visited 01/24/05).

Arizona's recent recognition of religious faith extends beyond the Capitol grounds. On September 15, 2001, Arizona and the nation were shocked when Balbir Singh Sodhi, an Arizonan and a devout Sikh, was murdered because he wore a turban. *See* Laurie Goodstein and Tamar Lewin, *A Nation Challenged: Violence And Harassment: Victims Of Mistaken Identity, Sikhs Pay A Price For Turbans*, New York Times, September 19, 2001, at A1. The City of Mesa remembered Mr. Sodhi by planting a tree and putting up a plaque, which reads in part: "Sikhs believe: In one God. That all religious paths lead to God. That all people are equal in the eyes of God. In peace, and love for humankind." The city dedicated the plaque at an event entitled the "Embrace Diversity Memorial Event." *See* Lois Romano, *In 9/11 Events, Mixture of Pain And Patriotism; Disparate U.S. Ceremonies Have a Common Thread*, Washington Post, August 26, 2002, at A01; *and* Hari Nam Singh, *Balbir Singh Sodhi Memorial Dedication September 14, 2003 in Mesa, Arizona, USA, at* http://healingsource.com/sodhi/sept-14-2003/gallery/pages/med/100_med.html (last visited 01/24/05).

The memorials for Father Braun and Mr. Sodhi demonstrate that governments erect religious displays because they recognize that religious faith is important to individuals and to society at large.

II. THIS COURT SHOULD AFFIRM THE FIFTH CIRCUIT AND ESCHEW RIGID STANDARDS THAT MILITATE AGAINST THE ROLE OF RELIGION IN A PLURALISTIC SOCIETY

Arizona's consistent practice of acknowledging religious faith is far from anomalous. The federal government, to which the Establishment Clause is addressed, has acknowledged and affirmed the role of religion from its very creation. "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984).

America's religious heritage and its modern religious pluralism are compelling reasons for this Court to be wary of "rigid, absolutist view[s] of the Establishment Clause." *Id.* at 678; *see also County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 623 (stating the Court avoids analytical lines, "which entirely sweep away all government recognition of the role of religion in the lives of our citizens. . . .").

The Fifth Circuit found that Texas possesses a valid secular purpose for displaying its Ten Commandments monument. *Van Orden v. Perry*, 351 F.3d 173, 178-80 (5th Cir. 2003). This finding is correct because the purpose prong of the *Lemon* test requires that "appropriate deference" be accorded to the government's stated purpose for a religious display. *See Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). But in the years since *Lemon* was decided, this Court has applied the purpose prong both deferentially and with unrelenting scrutiny. *Compare, Mueller v. Allen*, 463 U.S. 388, 394-95 (1983); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *Bowen v. Kendrick*, 487 U.S. 589, 603-04 (1988); *and Bd. of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 249 (1990); *with Stone v. Graham*, 449 U.S. 39, 41 (1980); *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987); *and Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000). These divergent approaches have led to fundamentally inconsistent results in lower courts. *See, e.g., Kreisner v. San Diego*, 1 F.3d 775, 782 (9th Cir. 1993) (deferring to city's stated secular purpose); *and Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 773 (7th Cir. 2001) (finding that state's asserted purpose was not in fact its "primary purpose").[3] This Court should clarify the applicable standards so that government and citizens alike can discern the requirements of the First Amendment.[4]

The purpose prong was never intended to root out religious references from the public square. "Were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated." *Lynch*, 465 U.S. at 681 n.6. If this Court retains the secular purpose test,[5] it should clarify that the government need only provide a single secular purpose to justify official acknowledgment of religion.

The Fifth Circuit was also correct in holding that the Texas Ten Commandments monument did not have the effect of impermissibly advancing religion. *Van Orden*, 352 F.3d at 180-82. The court appropriately applied the standard of the reasonable observer. *Id.* (citing *Allegheny*, 492 U.S. at 595).

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[3] As Chief Justice Rehnquist has observed, the purpose prong is "mercurial in application." *Wallace*, 472 U.S. at 108 (Rehnquist, C.J., dissenting).

[4] As this Court has recognized, unclear standards "inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (quoting *Bagett v. Bullitt*, 377 U.S. 360, 372 (1964)).

[5] *Amici* join the suggestion of the 18 *amici* States, including Arizona, that the purpose test should be abandoned in favor of a clearer and more objective approach. *See* Brief *Amici Curiae* of the States of Indiana, *et al.* at 2-3; 18-19, *Van Orden v. Texas* (No. 03-1500).

The reasonable observer test is an objective inquiry; "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context underlying a challenged program." *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) (citing *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001); and *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995)).

Justice O'Connor has recently explained why the test is objective:

> Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement. . . . There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion.

Elk Grove Unified School Dist. v. Newdow, 124 S.Ct. 2301, 2321-22 (2004) (O'Connor, J. concurring) (emphasis in original; internal citation omitted). In this case, the Petitioner urges this Court to believe that a reasonable observer would myopically focus on the Ten Commandments monument while failing to notice any of the other historical and cultural monuments on the Texas Capitol grounds. This approach truly does "render the test an absurdity." If followed, it would mechanically invalidate all state references to religion.

This Court should also decline all invitations to place exclusive reliance on whether a religious display is situated in or near the "seat of government." *See, e.g.*, Brief of Petitioner at 34-38, *Van Orden v. Perry* (No. 03-1500). Texas displays many memorials, statues, works of art, and general commemorations on its capitol grounds. Some of these displays have religious content, others do not, but they all share the common purpose of commemorating the state's cultural heritage. The reasonable observer must be deemed aware of these facts.

If religious displays could be considered unconstitutional simply because of placement at "the seat of government," countless existing displays in Texas, in Arizona, and across the nation would be affected. Displays in the Supreme Court building and in this Court's own chamber could hardly survive such scrutiny. *See Lynch*, 465 U.S. at 677. Overemphasis on whether a display is near the "seat of government" eviscerates the reasonable observer standard. Texas is a diverse state with heterogeneous religious practices. The reasonable observer knows of this diversity and would never expect any one decoration on the capitol grounds to carry the state's imprimatur to the exclusion of all others.

The "history and ubiquity" of religious displays has become a key part of the endorsement inquiry. *See Newdow*, 124 S.Ct. at 2323-24 (O'Connor, J., concurring); *Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring); *see also Freethought Soc'y of Greater Philadelphia v. Chester County*, 334 F.3d 247, 265 (3d Cir. 2003) ("the reasonable observer would perceive a historic plaque as less of an endorsement of religion than a more recent religious display"). The Texas Ten Commandments Monument has been publicly displayed for 42 years without a legal challenge. *See Van Orden*, 351 F.3d at 181. This is a cogent reason why the reasonable observer would never consider its presence a state endorsement of a specific religious belief. But even if the Texas monument was much younger, it would still be constitutional. The Establishment Clause is more than just a "safe harbor" for antiquated relics of what American society once was. States should be allowed to continue to celebrate their present culture, even as they commemorate their proud heritages.

The age of a religious display, though sometimes relevant, should not be dispositive of its constitutionality. Arizona's memorials honoring the memories of Father Braun and Balbir Singh Sodhi are not impermissible endorsements of religion simply because they were erected in 2001 and 2003, rather than in 1964 like Arizona's Ten Commandments monument. This Court should avoid an analytical approach that would create a constitutional "grandfather clause" for older monuments, but rigidly invalidate all modern commemorations of religious faith.

III. PERSONAL DISAGREEMENT IS NOT CONSTITUTIONAL INJURY

The Petitioner in this case could make no claim of constitutional injury if he were seeking to suppress a display that he disagreed with as a matter of politics, philosophy, or artistic taste.[6] The result should not change here, where he has targeted one of many monuments on the Texas State Capitol grounds because he disagrees with its religious content. *Van Orden*, 351 F.3d at 175-76.

> [T]he Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory.

Newdow, 124 S. Ct. at 2327 (O'Connor, J., concurring).

Significantly, Petitioner and others who oppose government recognition of religious faith are not without recourse. This Court has repeatedly affirmed that the government is politically accountable for the content of its own

[6] *See generally, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485-86 (1982) ("psychological" injury is insufficient to confer Article III standing).

speech. *See Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000); *Rust v. Sullivan*, 500 U.S. 173, 192-95 (1991). The Establishment Clause, however, as illuminated by history, does not convey a heckler's veto to offended observers. To rule otherwise would trigger the expurgation of monuments and displays across the country.

CONCLUSION

The Establishment Clause is not at odds with our nation's religious heritage or with the necessary role religion plays today in our pluralistic culture. The Texas Ten Commandments monument should not be removed from amid all the other cultural monuments on the Capitol grounds because of its religious content.

The statue of Father Kino at the Arizona State Capitol Complex in Phoenix includes an embedded time capsule, which will be opened on August 22, 2235. *Memorial Descriptions*, *supra*, at 1. *Amici* trust that on that day displays like the statue of Father Kino and the Ten Commandments monument will still be standing, having survived all misguided attempts to remove them from the public square.

The Court should affirm the decision below.

Respectfully Submitted,

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Dated: January 27, 2005

APPENDIX

Ten Commandments Monument
Arizona State Capitol Complex
Phoenix, Arizona